Petition

81-1696

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

William M. Hawkins,

Petitioner,

vs.

Equal Employment Opportunity Commission, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF THE APPEALS FOR THE SEVENTH CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF THE APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 28, 1981, in this case.

QUESTIONS PRESENTED

1. (a) Did the Court of Appeals for the Seventh Circuit deny the Plaintiff-Appellant "equal protection and due process of the law" in affirming the decision of the Judge of the United States District Court who adopted the findings of fact and conclusions of law entirely as proposed by one of the litigants (Defendant-Appellee) which did not reflect the original products of a disinterested mind and (b) which was in conflict with other Circuits on the same matter. See In Re Las Colinas, Inc., 426 F. 2d 1005 (1st Cir. 1970); Nyyssonen v. Bendix Corporation, 342 F. 2d 531, 532 (1st Cir.), cert. denied, 382 U.S. 847, 86 S. Ct. 63, 15 L. Ed. 2d 86 (1965); Louis Dreyfus & Cie v. Panama Canal Company, 298 F. 2d 733 (5th Cir. 1965); Kruger v. Purcell, (3rd Cir. 1962) 300 F. 2d 830, 4 V.I. 361; Island Construction Corporation v. Danielson, (3rd Cir. 1963) 316 F. 2d 161, 163, 4 V.I. 426, 431: and Federal Rules Civil Procedures 52(a)

28 U.S.C.A.

2. (a) Did the Court of Appeals deny the Plaintiff-Appellant "due process of the law" when it failed and refused to render an decision on an important question of federal law which has not been, but should be settled by the Court to wit:

> "Does employees of the Federal Government have the same rights and privileges as employees of the private sector under Title VII of the Civil Rights Act of 1964, as amended, in filing a charge of discrimination within 180 days from the date of the alleged violation?"

See United States v. City of Chicago, 573 F. 2d 416 (7th Cir. 1978); Chandler v. Roudebush, 425 U.S. 840, 841, 96 S. Ct. 1949, L. Ed. 2d 416 (1976); Clark v. Chasen, 619 F. 2d 1330 (1980); and Sias v. City Demonstration Agency, 588 F. 2d 692, 695 (9th Cir. 1978).

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OPINIONS BELOW

The opinions below on which this appeal is based are in chronological order, as follows:

Opinion of the United States District Court for the Southern District of Indiana ("District Court") dated April 6, 1980, as yet unreported.

Opinion of the Court of Appeals, dated September 28, 1981, as yet unreported, which is the subject of this appeal.

JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed by this petition were dated September 28, 1981. No petition for rehearing was filed. The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION, STATUE AND RULE INVOLVED

UNITED STATES CONSTITUTIONAL PROVISION

This case involves the Due Process of Law Clause of the Fifth Amendment to the Constitution of the United States which provides:

"Criminal actions - Provisions concerning - Due process of law and just compensation clauses. - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment by a grand jury, exept in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES STATUE

The Equal Employment Opportunity Act of 1972

Section 717(b) provides:

"Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."

The Equal Employment Opportunity Act of 1972

Section 717(e) provides:

"Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Excutive Order 11478 relating to equal employment opportunity in the Federal Government."

FEDERAL RULE OF CIVIL PROCEDURE

The Federal Rule of Civil Procedures 52(a) states:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall enter pursuant to Rule 58."

STATEMENT OF THE CASE

The petitioner commenced the action in the United States District Court for the Southern District of Indiana, in June, 1977, under § 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, against Osma Spurlock, William Howard, Elmer McClain, Eleanor Holmes Norton, Preston David and the Equal Opportunity Commission, defendants. The issues were race, sex discrimination and opposition to discriminatory practices. The complaint was amended and made more specific on October 6, 1977. The complaint was further amended and/or supplemented on June 28, 1978 and the claim was stated in one count. The complaint was further amended

and/or supplemented on April 30, 1979 and the claim was stated in one count. The complaint was further amended and/or supplemented in the various pre-trial conferences including the one on the first day of trial. Issue was joined by the defendant's answers of November 28, 1977, July 7, 1978 and May 10, 1979. Trial of the issues commenced after a pre-trial conference on May 22, 1979 and continued through May 24, 1979 when it was adjourned and the trial was resumed on February 11, 1980 and continued through February 15, 1980 when it was adjourned and the trial was resumed on February 18, 1980 and continued through February 22, 1980 when it was adjourned and the trial resumed on February 25, 1980 through and was concluded on February 26, 1980 when the Court sustained the defendant's motion to dismiss the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedures and DISMISSED plaintiff's action on the merits in a bench

ruling (6a - 35a). The defendant was ordered to submit proposed findings of fact, conclusions of law and judgment entry by March 26, 1980 which time was extended to April 19, 1980 on March 24, 1980 at the request of defendant. The defendant complied on April 18, 1980.

The petitioner herein took an appeal from the judgment of dismissal of the District Court for the Southern District of Indiana, Indianapolis Division to the United States Court of Appeals, Seventh Circuit. The appeal was heard on September 28, 1981 on the record briefs and oral argument on behalf of the appellant, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED (1a - 5a).

The petitioner on December 17, 1981 applied for extension of time to file petition for writ of certiorari, and said application was granted to February 25, 1982.

STATEMENT OF THE FACTS

After the appellant filed his suit in the United States District Court on June 27, 1977, the Director and Deputy Director of the Indianapolis District Office of EEOC intensified their efforts to strike back at the appellant until they proposed the removal from Service on or about August 28, 1977. The appellant filed retaliation charges on August 24, 1977, September 9, 1977, September 15, 1977, October 5, 1977, March 7, 1978 and finally in July 1978 based upon his removal the appellant filed his final charge of retaliation.

Throughout the trial the appellant introduced evidence that his rights under Title VII were violated and that he had filed timely discrimination charges of racial, sex and retaliation and opposition to discriminatory practices against the appellees. The appellant further stated he had complied with all of the administrative procedures that

were necessary precedence to perfect his right to file a civil action in Court.

EEOC Order No. 577(c) dated September 29, 1975, which reflects the Equal Employment Opportunity policies and procedures of the agency states:

> "Rejections or conciliations of complaints- When the Director of EEO rejects a complaint because it was not timely filed or within the purview of the Director, or cancels a complaint because of failure to prosecute the complaint, the Director shall transmit the decision by letter to the complainant and/or complainant's representative and shall inform the complainant of his or her right to appeal to Civil Service Commision; the right to file a civil action and the time limit applicable thereto."

At no time during the trial did the appellee introduce into evidence a letter showing that the Director of EEO for the EEOC had issued a rejection of any charges from the appellant because of untimeliness. In fact one of the appellee's witness Margaret Powell in her affidavit (53a) which stated that the appellee was following the procedures that were given to her in training.

In all the charges which the lower court found untimely, the appellant brought to the courts attention that the other courts as well as the Supreme Court have held that federal employees should have the same rights and privileges as employees in the private sector, hence, the right to file charges of discrimination within 180 days. Now if the EEOC in their interpretation limits their employees the right of 180 days they are not giving their employees due process and equal protection of law afforded by the Constitution (Tr. pgs 1656-1659). The Equal Employment Act of 1972 Section 717(e) states that nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

The appellant states that the trial Court erred when the Court sustained the appellee's motion to dismiss the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and DISMISSED appellant's action and when the Court ordered the appellee to submit proposed findings of fact, conclusions of law and judgment entry.

Additionally, the District Court's decision is contrary to the purpose of the Civil Rights Act of 1964, as amended, and contrary to abundant case authority, including decisions in the Seventh Circuit and the Supreme Court of the United States.

In Flowers v. Crouch-Walker Corporation, 552 F. 2d 1277 (1977), the United States Court of Appeals, Seventh Circuit, held that critical view of challenged finding of district court is appropriate where findings of fact and conclusions of law of which it is a part were not original product of a disinterested mind.

In In Re Las Colinas, Inc., 426 F. 2d 1005

(1970), the United States Court of Appeals, First Circuit, held that where federal district court, in rendering its opinion, adopted almost verbatim the proposed findings of fact and conclusions of law submitted by one party, so that the entire opinion, occupying some 20 printed pages, was written from end to end counsel and case involved sharply disputed facts founded upon evidence largely oral in nature, for purposes of appeal, maximum doubt was case on the findings of fact. Fed. Rules Civil Proc. rule 52(a), 28 U.S.C.A.

In Nyyssonen v. Bendix Corporation, 342 F. 2d 531, 532 (1st Cir.), cert. denied, 382 U.S. 847, 86 S. Ct. 63, 15 L. Ed. 2d 86 (1965), the court considered the contention that, by adopting a portion of defendant's draft findings of fact verbatim, the district court denied plaintiffs due process of law.

In Louis Dreyfus & Cie. v. Panama Canal Company, 298 F. 2d 733 (5th Cir. 1962), the court held that even though the clearly erroneous rule was not erased by the practice

of adopting counsels' proposals, without the "badge of personal analysis," reviewing courts in close cases should feel more justified in remanding with a direction that further findings be made. When the findings have been drafted by the trial judge himself, they carry a certain badge of personal analysis and determination that may dissuade an appellate court from reversing in a doubtful case. When that badge is missing, the appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered--if the evidence supporting the decision is of a doubtful nature. The significance of these considerations with regard to any particular finding depends on the nature of the issue and the relevant evidence. If the decision depends directly upon two or three issues that are clearly drawn, it will be clear that the judge must have focused on those questions before reaching his decision, and therefore it can readily be assumed that the findings

accurately reflect his convictions. By contrast, if the questions of fact are complicated and numerous, not all of them being crucial to a determination of the case as a whole, there is greater cause for suspicion that the judge may have allowed certain of the proposed findings to slide under the fence, despite his doubts as to the questions, because they were not necessary to the decision. The findings also will carry more of a badge of personal determination when the trial judge has selected certain of the proposed findings but written others himself or when he has revised and edited the proposed findings, than they will when he has adopted a slate of findings verbatim.

It is the appellant's contention that when the judge of the District Court asked counsel for the Defendant-Appellee to assist him with her ideas to formulate his opinion on whether the appellant was discriminated or not, it certainly placed the appellant in a disadvantage position. As stated earlier in

Flowers v. Crouch-Walker Corporation, supra, the Court held that critical view of challenged finding of district court is appropriate where findings of fact and conclusions of law of which it is a part were not original product of a disinterested mind. The record will show that the trial judge, himself could not justify the low performance appraisal given to the Plaintiff by the Defendant (Tr. pgs. 1732-1736). The Judge asked the Defendant's attorney after all evidence had been given by the Defendant the follow:

The Court: Ms. Wilson, would you assist me with your ideas here on why the occurrence of the--what precipitated the controversy here occuring a short time after his being appraised as an excellent employee? Would you cover that for me?

Ms. Wilson: The occurrence of what, your Honor?

The Court: Well, what precipitated it, the whole controversy here? What occurred between one appraisal and the next appraisal that precipitated it?

Ms. Wilson: Well, I think all of the evidence that's been presented shows that the Plaintiff had a very serious conduct problem

during that period of time. He continually

The Court: That didn't exist before the good appraisal?

Ms. Wilson: That correct

The Court: Well, lets take one item: How much evidence have you offered about practice of law interfering with his fulfilling his mission as an employee that occurred prior to that favorable appraisal?

Ms. Wilson: Well, I believe, your Honor that the Plaintiff testified that his practice was minimal during that period, that early period of time. The practice of law listed in the exhibits, I think fifteen, sixteen docket entry cases.

The Court: That occurred prior to his appraisal or after, or after?

Ms. Wilson: I think there may have been a few, perhaps two or three, that were filed in 1975.

The Court: That's the summation I need as to fitting it in the appropriate places.

Ms. Wilson: Yes, a number of them were filed--let's see--oh, thirteen filings, it appears, occurred prior to March 31, 1976, and that most of those are filings---there are only three--four, I'm sorry, four appearances. Most of those are filings, the initiation of the action and the appearance in

court actually taking place after that period of time. We have some sixty appearances and filings shown on the records that have been introduced, so that the bulk of it occur after March 31.

The Court: That's one item. And what other change in condition was there after the appraisal?

Ms. Wilson: The continued--the attack on the Deputy Director certainly showed insubordination, calling his supervisor an Uncle Tom nigger. The Deputy learned of the violation of privacy towards him. The Union complained about his conduct, his loud conduct, which precipitated a memo to him from the Director.
He repeatedly went around the local office here to the Regional Director and to headquarters. In fact, he sent a copy of his initial grade increase memo on Mr. Carpenter to the Regional Director, which was certainly not called for in the order.

The trial judge further asked the counsel for the Defendant-Appellee the following questions at the end of the trial:

The Court: Was the evidence here supportive of your case in the so-called alleged retaliatory acts by your client, were they justified by reason of the conduct of the Plaintiff here, under this evidence?

Ms. Wilson: Yes, your Honor, I believe that the evidence does support the action taken.

The Court: Was the Plaintiff guilty, under this evidence, of harrassment himself in response to the various rulings and actions of your principals?

Ms. Wilson: Certainly, one of the memos specifically indicates that he threatened to go to the Civil Service Commission. Another memo indicates that he made threats to the Deputy Director to file a charge on the Woodie Carpenter incident.

The Court: When was the libel and slander action filed?

Ms. Wilson: In November of 1976.

The Court: Where was that filed?

Ms. Wilson: In the State Court. That was later removed to this Court, Federal Court, and was voluntarily dismissed. That certainly indicates some intimidation--attempt to intimidate the Deputy Director.

The Court: Anything else?

Ms. Wilson: No. your Honor, I believe not.

The Court: All right, we'll stand recessed. The Court will review his notes here. (Tr. pgs. 1732-1743)

The above is just one of many instances where the

Plaintiff-Appellant was placed in a defenseless position by the trial judge, and was constantly reminded that the Plaintiff was suing the United States of America.

In Roberts v. Ross, 344 F. 2d 747 (3rd Cir. 1965), the court held that this court has had occasion to point out that Rule 52(a) of the Federal Rules of Civil Procedure requires the trier of the facts to find the facts specially and state his conclusions of law thereon with clarity. The findings of fact and conclusions of law must be sufficient to indicate the bases of the trial judge's decision. Kruger v. Purcell, 3 Cir. 1962, 300 F. 2d 830, 4 V.I. 361; Island Construction Corporation v. Danielson, 3 Cir. 1963, 316 F. 2d 161, 163, 4 V.I. 426, 431. Moreover we have observed in this case and in a number of others which have been brought here from the district court for review that the judge of the court has followed the practice of announcing his decision for the plaintiff or the defen-

dant substantially in the form of a general verdict, either in a written order or by communication to counsel, and of thereupon directing counsel for the prevailing party to prepare and submit findings of the fact, conclusions of law and a form of judgment. The trial judge's order has not been accompanied by an opinion setting out, even summarily, the facts and legal conclusions which have brought him to his decision. Obviously the judge must have dealt with the questions of fact and law involved in the case in the course of the reasoning by which he has reached his ultimate conclusion, even though his reasoning has not been articulated and put on paper. But counsel who is called upon to articulate and write out the findings and conclusions must do so without any knowledge of the fact findings and reasoning processes through which the judge has actually gone in reaching his decision. We strongly disapprove this practice. For it no only imposes a wellnigh impossible

task upon counsel but also flies in the face of the spirit and purpose, if not the letter, of Rule 52(a). The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusions of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule. At most they provide the judge with an opportunity to reconsider the bases of his original decision but without affording the parties any information as to what those bases were or which of them are being reconsidered. At worst they are likely to convict the judge of error

because, as here, they are inadequate to support his decision or because, as we have observed on other cases, they are loaded down with argumentative overdetailed partisan matter much of which is likely to be of doubtful validity or even wholly without support in the record. In Mesle v. Kea Steamship Corporation, 1958, 260 F. 2d 747, 750, this court, speaking through Judge McLaughlin, pointed out that we disapprove the practice of a trial judge adopting findings of fact and conclusions of law prepared by counsel for the prevailing party. It has been the general practice of the district judges of the Third Circuit in the past under Rule 52(a) to formulate their findings of fact and conclusions of law in the course of and as a part of their decision-making process and to articulate and file them at the time of announcing the decision, either in an opinion if filed at that time or in a separate document. For the reasons set out in this opinion we strongly approve this

practice and direct it to be followed in the future by the court below.

In Brenger v. Brenger, 142 Wis. 26, 125 N.W. 109 (1910), quoted in Otis, Improvements in Statement of Findings of Fact and Conclusions If Law, 1 F.R.D. 83, 85 (1940):

> "Experience shows that counsel, the most able, honorable and conscientious, * * * after the close of a hotly contested case, are not in the frame of mind, ordinarily best suited to drafting the findings, which must express the judgment of the court. That is no criticism. It is only an acknowledgment of the natural infirmities of the most perfect of us. All are affected regardless of ability or purity; the difference is in degree. The making of the findings is a purely a judicial function."

Therefore, it is the appellant's contention that the above stated facts indicate that the proposed findings of fact, conclusion of law and a judgment entry were "clearly erroneous" and should be reversed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The question of Law presented on this petition is for clarification on whether Federal employees in the private sections under Title VII of the

Civil Rights Act of 1964, as amended. The petition thus poses an important question that the Court of Appeals of the Seventh Circuit has refused or failed to render an decision on the above question.

It is the appellant's contentions that the District Court or the Appeals Court should have ruled on the issue whether employees of the federal government had the right to file a charge of discrimination under Title VII of the Civil Rights Act of 1964, as amended within 180 days from the date of the alleged violation as do the employees in the private sector.

Several of appellant's charges were found untimely and without merit by the lower court and affirmed by the Appeals Court, because they were not filed within thirty (30) days from the first date of the alleged violation which is in conflict with Title VII of the "Act". The Supreme Court has held that Title VII allows a 180 days to file a charge of discrimination (See Mohasco Corporation v.

Silver, 20 FEP Case 464, 602 F. 2d 1083). That many Courts have held, as well as the Supreme Court, that federal government employees should have the same rights as employees in the private sector in bringing Title VII charges.

In United States v. City of Chicago, 573 F. 2d 316 (1978) the United States Court of Appeals, Seventh Circuit, held that the purpose of 1972 amendments of the Civil Rights Act was to give public employees the same protections against discrimination as those enjoyed by employees in the private sector. In enacting the 1972 Amends, Congress intended to extend to government employees "the same benefits and protections in equal employment as the employees in the private sector of the economy." S. Rep. No. 92-415, 92nd Cong., 2nd Sess., p. 9 Cf. Chandler v. Roudebush, 425 U.S. 840, 841, 96 S. Ct. 1949, L. Ed. 2d 416 (1976).

It is undisputed that the 1972 Admendments

to Title VII are not enactment to enforce the anti-discrimination prohibition of the Equal Protection Clause and are "plainly adapted to that end." The purpose of the 1972 Admendments was to give public employees the same protections against discrimination as those enjoyed by employees in the private sector. It was well within congressional authority to weigh the competing policy consideration and determine that public employees required the safeguards against discrimination given to private employees.

In Clark v. Chasen, 619 F. 2d 1330 (1980), the United States Court of Appeals, Ninth Circuit, held that the legislative history of the Equal Employment Opportunity Act of 1972 recounted at length in Hackley v. Roudebush, 520 F. 2d 108 (D.C. Cir. 1975), makes clear that Congress was deeply concerned with the "Government's abysmal record in minority employment" and the rooting out of every vestige of employment discrimination within the

federal government." Congress was also concerned with the appearance of fairness and equality in federal employment, in addition to the actuality of equal opportunity.

The Court further held that they could see no reason for differentiating between federal and private sector employees by burdening federal employees with requirements in addition to the statutory prerequisites to suit. Such a result would be contrary to Congress expressed intent in several ways. Most obviously, any additional jurisdictional prerequisites to suit would impede the rooting out of every vestige of employment discrimination within federal employment (requiring federal employees to file a charge of discrimination within thirty (30) days instead of 180 days from the date of discrimination is contrary to Congress expressed intent). Moreover, Congress was concerned with minimizing, not increasing, any disparity in the treatment of federal employees the same rights and impartial treat-

ment which the law seeks to afford employees in the private sector.

It is the appellant's contentions that to allow the employees of the federal government only thirty (30) days to file their charges from the date of the last discriminatory act is unconstitutional. When the Equal Employment Opportunity Commission and Civil Service Commission in their interpretation of Title VII limited the appellant and other federal employees due process and equal protection of the law as afforded by the Constitution. The Equal Employment Opportunity Act of 1972 Section 717(e) states that nothing contained in the Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the constitution and statutes or of its or his responsibilities under Executive Order 11748 relating to equal employment opportunity in the federal government.

We respectfully submit that the courts below

failed or refused to rule on this issue and such a ruling is needed and necessary to enable more than two million (2,000,000) federal employees their constitutional rights.

Since the Court of Appeals, Seventh Circuit, affirmed the judgment of the District Court upon "Judge Holder's opinion below," our argument must thus direct itself to the opinion and holding of Judge Holder in the District Court, which I believe, has failed to perceive the distinction between the findings which has been drafted by the trial judge himself, which carry a certain badge of personal analysis and determination and one that has been drafted by one of the litigants who was called upon to articulate and write out the findings and conclusions without any knowledge of the fact findings and reasoning processes through which the judge would have actually gone in reaching his decision. For it not imposes a wellnigh impossible task upon counsel but also flies in the fact of the spirit and

purpose, if not the letter, of Federal Rule Civil Procedure 52(a). The purpose of that rule is to require the trial judge to formulate and articulate his findings of fact and conclusion of law in the course of his consideration and determination of the case and as a part of his decision making process, so that he dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made. Findings and conclusions prepared ex post facto by counsel, even though signed by the judge, do not serve adequately the function contemplated by the rule. (See Roberts v. Ross 344 F. 2d 747 (3rd Cir. 1965) and Reply Brief page 4). The Third Circuit, speaking through Judge McLaughlin, in Mesle v. Kea Steamship Corporation, 1958, 260 F. 2d 747, 750, pointed out that they disapprove of the practice of a trial judge adopting findings of fact and

conclusions of law in the course of and as a part of their decision making process and to articulate and file them at the time of announcing their decision either in an opinion if filed at that time or in a separate document. That the Third Circuit strongly approve this practice and direct that it be followed by the Courts below.

It is the appellant's contention that when the judge of the District Court ordered counsel for the Defendant-Appellee to submit proposed findings of fact and conclusions of law and a judgment entry (Tr. pgs 1743-1752) is "clearly erroneous" but also flies in the fact of the spirit and purpose, if not the letter, of Rule 52(a) as stated in Roberts v. Ross, supra.

In Brenger v. Brenger, 142 Wis. 26, 125 N.W. 109 (1910), quoted in Otis, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 83, 85 (1940):

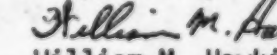
> Experience shows that counsel, the most able, honorable and conscientious, * * * after the close of a hotly contested case,

are not in the frame of mind, orginarily best suited to drafting the findings, which must express the judgment of the court. That is no criticism. It is only an acknowledgment of the natural infirmities of the most perfect of us. All are affected regardless of ability or purity; the difference is in degree. The making of the findings is purely a judicial function."

CONCLUSION

The questions here presented involving the denial of equal protection and due process of law to the appellant and other federal employees when they are denied the right to file a charge of discrimination under Title VII of the Civil Rights Act of 1964 as amended within 180 days and the adopting of the findings of fact and conclusion of law by one of the litigants allowed in the Seventh Circuit is a denial of due process to the appellant and is in conflict with the ruling in other circuits and upon which this Court has not yet clearly spoken are of national importance and magnitude to warrant review by this Court.

Respectfully submitted,



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Appendix

Per Curiam Order

JUDGMENT-ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 28, 1981

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

Hon. WESLEY E. BROWN, Senior District Judge*

WILLIAM M. HAWKINS, Plaintiff-Appellant,	)Appeal from the United States District Court for the Southern District of Indiana,
No. 80-1699 vs	Indianapolis Division
OSMA SPURLOCK, etc.. et al., Defendants-Appellees.	)No. 77-C-390 Judge Cale J. Holder

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be,

*Senior District Judge Welsey E. Brown of the District of Kansas is sitting by designation.

and the same is hereby, AFFIRMED, with costs, in accordance with the Order of this Court entered this date.

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(ARGUED SEPTEMBER 28, 1981)

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Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

Hon. WESLEY E. BROWN, Senior District Judge*

WILLIAM M. HAWKINS, Plaintiff-Appellant, No. 80-1699 vs. OSMA SPURLOCK, etc., et al., Defendants-Appellees.	)Appeal from the United) States District Court) for the Southern) District of Indiana,) Indianapolis Division)No. 77-C-390) CALE J. HOLDER, Judge.

O R D E R

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellants, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

In 1970 the plaintiff, a black male, was hired by the Equal Employment Opportunity Commission

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(EEOC) as a GS-9 Equal Employment Officer at the EEOC's Indianapolis Office. He was promoted in 1971 and 1973. In 1974 he was promoted to a GS-13 Supervisory Equal Opportunity Specialist. Since 1971 he has engaged in the private practice of law as an attorney.

The plaintiff violated the conditions under which he stated he was permitted to practice law. The violations included interferences with his EEOC duties, engaging in the private practice of law on government time, and accepting private cases which created conflicts of interest with his government employment.

At the close of the plaintiff's evidence the district court granted the defendant's Rule 41(b) motion to dismiss the plaintiff's Title VII discriminatory discharge suit. The court also ordered the defendant to submit proposed findings of fact and conclusions of law. "This circuit has no rule forbidding a district court from adopting findings of fact entirely or substantially as proposed by one of the litigants. In reviewing

such adopted findings, we recognize that they do not reflect the original products of a disinterested mind." Norfolk & Western Railway v. B.I. Holsen & Co., 629 F. 2d 486, 489 (7th Cir. 1980). Although we may scrutinize such findings more closely than usual, we must uphold them unless they are clearly erroneous. See Rule 52, Fed. R. Civ. P.; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100, 123 (1969).

At the close of the plaintiff's case the record contained sufficient evidence from which the court could conclude that the defendant had discharged the plaintiff because he had violated agency regulations and orders which governed his private practice of law and that no similarly situated employee had received different treatment. The plaintiff alleged that the defendant also violated Title VII by numerous pre-discharge actions which discriminated against the defendant or retaliated against him for filing discrimination charges. These allegations are without merit.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILLIAM M. HAWKINS	)
vs	) No. IP 77-390-C
ELEANOR HOLMES NORTON, AS CHAIR OF EQUAL OPPORTUNITY COMMISSION OF THE UNITED STATES OF AMERICA	)

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
JUDGMENT

The action was commenced by William M. Hawkins with the filing of his pro se complaint in two counts on June 27, 1977 against Osma Spurlock, individually and in her official capacity as District Director of Equal Employment Opportunity Commission; William Howard, individually and in his official capacity as Deputy District Director of Equal Employment Opportunity Commision; Elmer McLain, individually and in his official capacity as Regional Director of Equal Opportunity Commission; Eleanor Holmes Norton, in her official capacity as Chair of Equal Employment Commission;

Preston David, in his capacity as Executive Director of Equal Employment Opportunity Commission. The complaint was amended and made more specific on October 6, 1977. The complaint was further amended and/or supplemented on June 28, 1978 and the claim was stated in one count. The complaint was further amended and/or supplemented on April 30, 1979 and the claim was stated in one count. The complaint was further amended and/or supplemented in the various pre-trial conferences including the one on the first day of trial. Issue was joined by the defendants' answers of November 28, 1977, July 7, 1978 and May 10, 1979. Trial of the issues commenced after a pre-trial conference on May 22, 1979 and continued through May 24, 1979 when it was adjourned and the trial was resumed on February 11, 1980 and continued through February 15, 1980 when it was adjourned and the trial was resumed on February 18, 1980 and continued through February 22, 1980 when it was adjourned and the trial resumed on February 25, 1980 through and was concluded

on February 26. 1980 when the Court sustained the defendant's motion to dismiss the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and DISMISSED plaintiff's action on the merits in a bench ruling. The defendant was ordered to submit proposed findings of fact, conclusions of law and judgment entry by March 26, 1980 which time was extended to April 9, 1980 on March 24, 1980 at the request of defendant. The defendant complied on April 8, 1980.

The plaintiff voluntarily dismissed the action against all defendants sued in their individual capacities. In accordance with the April 13, 1979 pre-trial conference, the order concerning which conference was filed with the United States Magistrate on April 27, 1979, the action was dismissed against the other named defendants sued in their respective official capacities and the action is deemed to be against the only appropriate defendant, Eleanor Holmes Norton, as Chair of Equal Opportunity Commission of the United States of America.

The Court having weighed the evidence and determined the credibility of the evidence and witness in this bench trial now makes its findings of fact and conclusions of law.

The INdianapolis Office of the Equal Employment Opportunity Commission was established in 1970 with Osma Spurlock as the Officer in Charge. The office began with a small staff and limited functions, both of which grew over the years; in 1973, the office was elevated to the status of a District Office and Osma Spurlock (hereafter "the Director" or "Spurlock") was named its District Director, a position she has retained to the present time. The Equal Employment Opportunity Commission (hereafter "EEOC" or the "agency") is a federal agency established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, whose functions at all times pertinent to this suit were to receive and investigate charges of employment discrimination filed against private employers. Plaintiff, William Hawkins, (herafter "Hawkins" or "plaintiff")

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was hired by the Indianapolis Office in 1970 as a GS-9 Equal Employment Officer. Hawkins was promoted by Spurlock to GS-11 in 1971, to GS-12 in 1973, and in 1974 to a GS-13 Supervisory Equal Opportunity Specialist. From February 1975 until the spring of 1979 William Howard as the Deputy Director of the Indianapolis District Office (hereafter "I.D.O.") of the EEOC. Hawkins is a Black male. District Director Spurlock is a Black female and former Deputy Director Howard is a Black male. During his employment with EEOC Hawkins served from time to time as an investigator of internal Equal Employment Opportunity (hereafter "EEO") complaints filed against the EEOC by its employees. Since 1971, Hawkins has been engaged in the private practice of law as an attorney. Hawkins was terminated from his position with the EEOC effective June 30, 1978 for engaging in the private practice of law in violation of EEOC regulations. The plaintiff was terminated from employment at EEOC for practicing law on government time and related

violations of agency regulations. The decision to terminate was made by the EEOC Director of Personnel based upon a Notice of Proposed Removal issued by the I.D.O. Director in March 1978; in August 1977, the Director had issued to plaintiff a Notice of Proposed Removal for practicing law on government time and related offenses, but cancelled the notice in March 1978 and issued the second Notice. The March 1978 Notice contained seventeen detailed allegations and referenced numberous exhibits, including Court documents, as supporting evidence. In the fall of 1971, the Director granted plaintiff oral permission to practice law upon the conditions that it would not interfere with the EEOC duties, that he not do it on government time, that he not abuse his leave, and that he not take any cases which could involve a conflict of interest. In 1971, the staff was small and office procedures were not rigidly formalized. Before 1975, the plaintiff reported directly to the Director, was in the second level of command in the office, and was given

wide latitude concerning the performance of his duties. By 1975, the I.D.O. had greatly increased in the size of the staff and its functions, and the position of Deputy Director was created and filled by the appointment of William Howard. After the Deputy Director arrived in February 1975, the chain of command was restructured so that all supervisors reported to him, policies and procedures became more formalized, and the wide latitude which plaintiff had been given to perform his duties was diminished. Plaintiff was uncomfortable over the fact that he was no longer able to decide what assignments he would do, or when he could absent himself from the office for various reasons. Further, this Court finds that plaintiff was uncomfortable with limitations that had been placed on his actions since they interferred with his practice of law which he conducted during the day. During the period August 1975 through June 1978, plaintiff was attorney of record for parties in at least 24 cases. He personally filed pleadings at the clerk's offices on approximately 30 occasions and appeared

at approximately 30 hearings in those cases: in approximately half of those instances, plaintiff was not on authorized leave from his job. The plaintiff acted as an attorney for clients on other occasions which did not result in the filing of lawsuits. The plaintiff personally filed pleadings in the offices of the various clerks during work breaks on some occasions, and appeared at some Court hearings during his lunch periods. The defendant's employees are given breaks and lunch periods so that they may rest in order to be able to give their employers full concentration throughout the work day. The plaintiff abused his relationship with EEOC by using his lunch periods and breaks to engage in the practice of law rather than to rest. Thus, his practice of law constituted an interference with his duties as an EEOC employee. The plaintiff was unable to leave the I.D.O. to file pleadings at the various Courts and return within the 10 minute break period given employees in the morning and afternoon. Further, the plaintiff

was unable to appear at a Court hearing and return within the 30 minute lunch period. Plaintiff abused his relationship with EEOC by practicing law beyond the time allotted employees for breaks and lunch, and that this resulted in interference with his EEOC duties. One of plaintiff's private clients came to the I.D.O. to see the plaintiff on two dates when Court appearances had been scheduled in the client's case. On one of those occasions, the Deputy Director spent time looking for the plaintiff to inform him that someone was waiting in the office to see him. The Court finds that EEOC activities were interferred with when plaintiff's private client came to see him at the I.D.O. Plaintiff acted as an attorney for two persons who had filed charges at the I.D.O. and that the charges were later processed by the unit which plaintiff supervised. Further, the plaintiff represented parties in two bankruptcy cases where the U.S.Department of Health, Education and Welfare was listed as a creditor. The above actions constitute a conflict of interest. Plaintiff violated the conditions under

which he stated he was permitted to practice law since his activities interferred with his EEOC duties, occurred on government time, and resulted in a conflict of interest. Also, the plaintiff engaged in the practice of law on a scale much greater than that which had been authorized by the Director. Plaintiff engaged in the practice of law in violation of agency regulations as stated by the agency in the Notice of Removal (hereafter the "Notice"). Plaintiff did practice law on government time, as charged in the Notice. Plaintiff did represent a client on government time at a hearing on a date when he had been given permission to absent himself from the office for the entire day to conduct official business, as charged in the Notice. Plaintiff did disobey the Director's instruction to cease practicing law on government time, as charged in the Notice. Plaintiff did engage in the practice of law while on sick leave, as charged in the Notice. Plaintiff did receive his private client at the I.D.O., as charged in the Notice. Plaintiff did

represent parties in cases where the U.S. Government was involved, thus creating a conflict of interest, as charged in the Notice. Plaintiff's conduct with regard to his practice of law in violation of agency regulations was dishonest, as charged in the Notice. The defendant's action was not a pretext for retaliation since he had violated agency regulations as stated in the Notice and that no similarly situated employees were treated differently.

Hawkins made numerous administrative EEO complaints alleging that the Director and Deputy Director discriminated against him because of his race and sex and for opposing discriminatory practices, and retaliated against him for having filed the complaints and this lawsuit. These complaints are contained in Trial Exhibits 57-70 which are attached hereto and made a part hereof. With regard to a first series of EEO complaints made by plaintiff, Trial Exhibits 57-62, the agency investigated and issued a final decision which found that plaintiff had not been

discriminated against in any manner. A second series of complaints, Trial Exhibits 63-67, were rejected by the agency on the basis that the plaintiff failed to engage in the pre-complaint counseling which was required by the regulations. A third series of complaints, Trial Exhibits 68-70, having been timely filed, were processed by the agency. In this action, plaintiff recites a number of incidents which he alleges were acts of discrimination against him with regard to the terms and conditions of his employment. He also refers to many other events, including his termination from EEOC, which he alleges were acts of retaliation against him for having filed EEO charges or this lawsuit.

Plaintiff claimed that he was discriminated against when he was given the assignment in late 1975 to prepare "No Cause" Letters of Determination (hereafter LOD's) on discrimination charges filed by charging parties against an employer in Kokomo, Indiana. Specifically, plaintiff alleged that the LOD's should not have been

assigned to his unit because they had been investigated by another unit; further, he asserted that the Director rejected his recommendation that the LOD's be issued as "Cause" but that she later accepted a "Cause"recommendation on the charges from a White male supervisor to whom the charges had.been later transferred for further processing. Agency regulations delegated to the District Director the Commission's authority to issue decisions on charges of discrimination, such decisions being entitled LOD's. Prior to late 1975, the Kokomo charges had been investigated in another I.D.O. unit, had been sent to Headquarters for further processing, and returned to I.D.O. for preparation of the LOD's. It is not unusual for I.D.O. charges to be assigned to a different investigator or unit when they are returned from Headquarters. The plaintiff orally recommended that "Cause" LOD's be issued on some Kokomo charges and that he did not submit to the Director any written LOD's before the charges were transferred in March 1976 to a unit supervised by a

White male; the White male supervisor recommended a "Cause"LOD to the Director on one of the charges. The Director did not issue the Kokomo LOD's with a finding of "Cause" as recommended by the White male supervisor. Plaintiff did not file an EEO charge concerning the Kokomo charges until July 1976, some three to four months after plaintiff's responsibility for the charges had ceased. The charge was untimely by several months and the allegation is without merit.

Plaintiff claimed that he was required in late 1975 or early 1976 to obtain jobs for the Director's son and to give the Director rides to work. The plaintiff and the Director were friends during the time period in question and that any such personal activities plaintiff may have engaged in were motivated by friendship. The Director had given plaintiff a ride to work; further, plaintiff had obtained jobs for a number of persons including his own son and the son of another I.D.O. employee. Plaintiff did not file an EEO charge until July 1976, some six to

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seven months after the incidents occurred. The charge was untimely by many months and the allegation is without merit.

Plaintiff claimed that he was discriminated against on the basis of race or sex when the Director assigned him to train the I.D.O. staff in conciliation. This assignment, made in December 1975, was to conduct the necessary training in conciliation to convert the employees in the I.D.O. from Specialist to Generalists during the period January to June 1976. Plaintiff was the only Supervisor in the office qualified to train the personnel in conciliations, was the only supervisor of conciliations in the I.D.O., and he had previously trained the staff on other occasions on other topics. Other employees similarly situated were not treated differently. Plaintiff did not initiate an EEO charge on the issue of the training until July 1976, some six to seven months after receiving the assignment and one month after the assignment ended. The charge was untimely by many months and the allegation has

no merit.

Plaintiff claimed that he was discriminated against by being assigned as supervisor of the Special Projects Unit (hereafter "SPU") in March 1976. In early 1976, the agency was undergoing a national reorganization. As a result, the office structure of the I.D.O. was changed, and all supervisors were given new assignments. Plaintiff was assigned as supervisor of the SPU. The Director selected plaintiff for the position due to his background. Plaintiff did not ask to be relieved of the duty after he was assigned to the SPU. The plaintiff's duties as supervisor of SPU were similar to his previous duties as supervisor of the conciliations unit. Plaintiff filed an EEO charge concerning the SPU assignment in July 1976, some four months after it was made. The charge was untimely by several months and the allegation is without merit.

Plaintiff claimed that he was discriminated against by having limitations put on the conditions under which he could make trips to the field

to conduct EEOC business. The Director denied plaintiff permission to make a trip in July 1976 with another I.D.O. employee because she felt there was no need for two employees to go on that trip. At the plaintiff's request, management issued him a memorandum explaining the conditions under which supervisors were permitted to go into the field. The other supervisors operated under the same general principles stated in the memorandum. Plaintiff testified that he was away from his office on field trips more than any of the other supervisors: further he admitted that prior to July 1976, he had received several memoranda from the Director and Deputy Director concerning his failure to follow office procedures when making trips to the field. The plaintiff, a supervisor, perferred being in the field rather than conducting his business from the office. Plaintiff was not denied permission to make any trip to the field other than the one in July 1976. Plaintiff had requested permission in August 1976 to make a trip to the field and was

instructed by the Deputy Director to identify, prior to leaving on the trip, those charges which he intended to process. The plaintiff was permitted to go on the trip by the Deputy Director even though plaintiff did not provide him with the requested list of cases. This allegation has no merit.

Plaintiff claimed that he was discriminated against with regard to the selection of two candidates for the unit which he supervised. Plaintiff had the authority only to recommend a candidate and the Director had the authority to make the selection. The Director selected one of the candidates who had been recommended by the plaintiff. The Deputy Director did not attempt to force him to pre-select two candidates for SPU. Other supervisors have not been treated differently with regard to selections of employees in their respective units. The selections were made in approximately February or March, 1976, some three or four months prior to the date when plaintiff filed an EEO

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charge on the matter. The charge was filed several months after the incidents occurred and the allegation has no merit.

Plaintiff claimed that the Deputy Director discriminated against him by requiring him to lower the evaluations (performance appraisals) which plaintiff had prepared on the employees in SPU. The Deputy Director had the authority to review the appraisals before plaintiff presented them to his subordinates; further, the Deputy Director had informed other supervisors that he would review the appraisals before the supervisors issued them to their subordinates. The plaintiff never filed an EEO charge on this allegation and it has no merit.

Plaintiff claimed that he was discriminated against for opposing discriminatory practices. He never identified what discriminated against or harassed. Plaintiff alleged in Trial Exhibit 57 that he had been discriminated against by being investigated on false allegations. These un-

specified allegations have no merit.

Plaintiff claimed that the Director retaliated against him for having filed EEO charges when she assigned to the SPU two employees whom plaintiff believed to be poor performers. However, these employees were assigned to the SPU prior to July 6, 1976, the date plaintiff filed his initial EEO charges. The assignment could not have been in retaliation for the filing of EEO charges. Specific personnel were assigned to the SPU as a result of the office reorganization which occurred due to the agency's conversion of personnel from the Specialist to the Generalist job category. Other supervisors were not treated differently concerning the assignment of personnel to their units. The plaintiff filed no EEO charge on this issue and the allegation has no merit.

Plaintiff claimed that he was retaliated against when the Deputy Director issued a warning notice to him on July 15, 1976 for having called the Deputy Director a "liar" and an "Uncle Tom

Nigger." During a disagreement plaintiff was having with the Deputy Director, he informed the Deputy Director that he (the Deputy Director) was acting like an "Uncle Tom Nigger." The Deputy Director was not aware that plaintiff had filed a previous EEO charge at the time the Deputy had issued the warning. The warning notice was not in retaliation for having filed the charges. Other employees similarly situated were treated no differently.

Plaintiff claimed that he was retaliated against by the Director when she issued to him a memorandum in September 1976 explaining that his conduct on a number of occasions had been inappropriate for a supervisor and that he must correct his behavior. The Director's statements stand unrefuted. The union had complained to the Director about plaintiff's conduct prior to the issuance of the memorandum. Other employees similarly situated were treated no differently.

Plaintiff claimed that he was retaliated against in August 1976 by the Director when she issued

plaintiff a reprimand which stated that he violated the Deputy Director's privacy by holding the telephone up so that two employees could listen to statements made by the Deputy Director during a telephone conversation he had with the plaintiff. Plaintiff did in fact hold the phone up so that two employees could hear the Deputy Director's remarks. Other employees similarly situated were treated no differently.

The plaintiff claimed that he was retaliated against for having filed EEO charges when the Deputy Director terminated his authority to review conciliation agreements in June 1976. Plaintiff had been assigned the task of reviewing all conciliation agreements during the conversion training in early 1976, and that when the training program was completed, all the I.D.O. supervisors were given authority to review conciliation agreements for their respective units. Plaintiff's assignment to review conciliation agreements was terminated prior to the filing of his initial EEO charge in July 1976; therefore,

such an action could not have been taken in retaliation for the filing of charges.

Plaintiff claimed that he was retaliated against by the Director in January 1977 when she rejected his recommendation to deny the annual raise (Within Grade Increase) of an employee under his supervision. The employee had filed a union grievance concerning plaintiff's recommendation of denial and such grievance cited procedural errors in plaintiff's recommendation. The Director rejected plaintiff's recommendation of denial on the procedural basis that it did not adequately document the employee's deficiencies. This same employee's former I.D.O. supervisor had previously recommended against the employee's promotion and the Director promoted the employee after he filed a grievance on the supervisor's negative recommendation.

Plaintiff claimed that he was retaliated against in March 1977 when the Deputy Director, in the plaintiff's absence, granted permission to an employee under the plaintiff's supervision

to make a business trip which had been scheduled for that day. The plaintiff had not informed the Deputy Director that he had instructed the employee not to leave for the trip until after the employee had conferred with the plaintiff. Further, the Deputy Director was the plaintiff's supervisor and the plaintiff was not in the office when permission was granted. Other employees similarly situated had been treated no differently.

Plaintiff claimed that he was retaliated against by being given a performance appraisal for the period April 1976-March 1977 which rated his performance as below average. Plaintiff had previously received a performance appraisal for the period April 1975-March 1976 which rated his performance as above average. Plaintiff's performance merited no higher appraisal than he was given. To the contrary, the preponderance of the evidence shows that during the 1977 performance appraisal period, plaintiff's conduct and behavior adversely affected his performance as an employee and was destructive of his pro-

fessional relationship with the Deputy Director and Director. It is uncontested that during the 1977 appraisal period, the plaintiff had received a warning notice for calling the Deputy Director a "liar" and "Uncle Tom Nigger," had received a reprimand for violating the Deputy's privacy, was the object of a union complaint concerning his conduct, was the object of a grievance filed against him by the Deputy Director for his conduct, had sued the Deputy Director for libel and slander based upon statements the Deputy made in documents which were given to the EEO counselor who was handling the plaintiff's EEO charges[1], had caused an investigation of the Deputy Director's and Director's actions at the

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Footnote 1. The court takes judicial notice of the records of the U. S. District Court for the Southern District of Indiana, Indianapolis Division, in the case of Hawkins v. Howard I.P. 76-715-C, which reveals that the plaintiff unilaterally withdrew his libel and slander complaint after the defendant removed the action from state court to this Court and filed a motion to dismiss.

I.D.O. by making allegations against them to an EEOC Commissioner, and had generally resisted the instructions and decisions of the Deputy Director and Director concerning his duties at I.D.O. The plaintiff was engaged in the practice of law during the 1977 appraisal period to a significantly greater extent than during the 1976 appraisal period, a factor which detracted from his performance as an EEOC employee by diminishing the time and energy which he could devote to his job. Similarly situated employees were treated no differently.

Plaintiff claimed that he was retaliated against by being issued memoranda by the Deputy and Director, but never identified the memoranda in question. Plaintiff claimed that he was retaliated against with regard to an unspecified letter of warning, an unspecified proposal to reprimand, and a reprimand, as specified in Trial Exhibits 63, 64 and 66 respectively.

Plaintiff claimed that he was retaliated against in late 1977 when an employee of the SPU was

transferred out of that unit by the Director. Prior to the employee's transfer, the plaintiff had complained to the Director that the employee was deficient in certain areas and should be replaced by a better employee. Other employees similarly situated were treated no differently.

The Court has jurisdiction of the parties and subject matter of this action under Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16.

The plaintiff has failed to prove each of the alleged facts of the essential legal elements of the plaintiff's action by a preponderance of the evidence.

The plaintiff's action against the federal employees was dismissed in pre-trial conference and is again DISMISSED with prejudice because plaintiff filed an amended complaint thereafter again named such federal employees other than Eleanor Holmes Norton, as Chair of Equal Opportunity Commission of the United States of America as defendants. Actions under 42 U.S.C. §2000e-1

may be filed against the head of the agency (EOC). Plaintiff's action as it pertains to statutes other than 42 U.S.C. §2000e-16 is DISMISSED with prejudice since a federal employee's exclusive remedy for employment discrimination claims is under 42 U.S.C. §2000e-16.

Plaintiff failed to establish a prima facie showing of the allegations of discrimination. Defendant's reasons for the action in dealing with plaintiff and defendant's employees were non-discriminatory reasons and were not indulged in on pretext.

Defendant is not entitled to recover attorney fees. 42 U.S.C. §2000e-5(k).

The defendant is entitled to recover the Court costs incurred and is instructed to timely file a bill of costs. Rule 54(d) of the Federal Rules of Civil Procedure.

Pursuant to this Court's Order of September 11, 1978, the defendant is awarded, upon proper proof, the defendant's reasonable expenses, including attorney fees, incurred for filing the defendant's

Motion for Sanctions with regard to Defendant's First Interrogatories. Pursuant to this Court's Order of January 24, 1979, the defendant is awarded, upon proper proof, the defendant's reasonable expenses, including attorney fees, incurred in filing the defendant's Renewed Motion For Sanctions with regard to the Defendant's First Interrogatories. Pursuant to this Court's Order of May 2, 1979, the defendant is awarded, upon proper proof, the defendant's reasonable expenses, including attorney fees, incurred in litigating the discovery issues involving the defendant's Second Interrogatories.

To the extent any above finding of fact has been denominated a conclusion of law, it shall be deemed a finding of fact; to the extent any above conclusion of law has been denominated a finding of fact, it shall be deemed a conclusion of law.

JUDGMENT

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing from the defendant by his complaint and the action is DISMISSED with prejudice.

IT IS FURTHER ADJUDGED that the defendant is awarded the defendant's costs incurred in defending this matter.

Dated this 6 day of April, 1980.

/s/_____
Cale J. Holder, Judge United States District Court Southern District of Indiana

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

WILLIAM M. HAWKINS,

Plaintiff

vs.

OSMA SPURLOCK, individually and in her official capacity as District Director of Equal Employment Opportunity Commission,

WILLIAM HOWARD, individually and in his official capacity as Deputy District Director of Equal Employment Opportunity Commission,

ELMER MCLAIN, individually and in his official capacity as Regional Director of Equal Employment Opportunity Commission,

ELEANOR HOLMES NORTON, in her official capacity as Chair of Equal Employment Commission,

PRESTON DAVID, in his capacity as Executive Director of Equal Employment Opportunity Commission,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendants.

CIVIL ACTION NO.

IP 77-390-C

IT IS ORDERED by the Court that the above entitle cause be and the same is hereby assigned for tria

_____ at

Room 218 United States Court Hous Indpls., IN

Dated Jun 27 1977

Cale J. Holder, Judge

COMPLAINT

COUNT I

Comes now the plaintiff, William M. Hawkins, and complains of the defendants, Osma Spurlock, individually and in her official capacity as District Director, William Howard, individually and in his official capacity as Deputy District Director, Elmer McLain, individually and in his capacity as Regional Director, Eleanor Holmes Norton, in her official capacity as Chair and Preston David, in his official capacity as Executive Director of Equal Employment Opportunity Commission, and for his claim alleges that:

JURISDICTION

1. This is an action for declaratory relief, injunctive relief and damages to redress the deprivation of rights secured to the Plaintiff, jurisdiction of this Court is invoked pursuant to §717(a) (c), 42 U.S.C. §2000e-5 (f) - (k), 16(c), 28 U.S.C. §1343 (3) (4), 28 U.S.C. §2201 and 2202, 42 U.S.C. §1981, and 42 U.S.C. §1985.

This is a suit in equity authorized and instituted pursuant to §717 (a) (c) of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. §2000e-16 (c), amending Title VII of the Civil Rights Act of 1964, Pub. L. No. Sperling v. United States, 515 F. 2d 251 (CA9) and Brown v. General Service Administration, (8EPDII9802) 1299 (2d Circuit 1974) L. No. 88-352, 78 Stat. 255, 42 U.S.C. §2000e et seq.; "The Civil Rights Act of 1866," 42 U.S.C. § 1981 and "The Civil Rights Act of 1871," 42 U.S.C. § 1985.

2. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by Title VII of the Civil Rights Act of 1964, as amended, (a) 42 U.S.C. §§2000 e et seq., providing for injunctive and other relief against discrimination in employment on the basis of race, religion, sex, national origin and opposition to discriminatory practices; (b) 42 U.S.C. §1981, providing for the equal rights of all persons to contract in every state and territory within the jurisdiction of the

United States; (c) 42 U.S.C. §1985, providing relief from conspiracy to deprive persons of their civil rights.

3. This is a proceeding for a Declaratory Judgment as to Plaintiff's rights, and for preliminary and permanent injunctions restraining the Defendant from maintaining and continuing discriminatory action against Plaintiff because of his race, sex and his opposition to their discriminatory practices relative to charging parties, compensation, terms, conditions and privileges of employment opportunities and otherwise adversely affected his status as an employee because of his race, sex and his opposition to their discriminatory practices. This complaint also seeks restitution to Plaintiff of all rights, privileges, benefits, and income that he would have received, but for defendant's unlawful discriminatory practices. This complaint also seeks punitive damages against Defendants, that Defendants, contriving and wickedly and maliciously intending to injure

Plaintiff in his good name and performance standard, mental and physical health with their unlawful discriminatory practices against Plaintiff and that the Plaintiff was harmed by the Defendants' discriminatory acts.

PARTIES

4. Plaintiff, William M. Hawkins, has been assigned to Indianapolis District Office since June, 1970. He now resides at 1844 West 65th Place, Indianapolis, Indiana, and is a black male citizen of the United States of America. He was unlawfully denied rights to perform his duties as a supervisor of Special Project Unit of Equal Employment Opportunity Commission of Indianapolis, and unlawfully denied other terms and conditions of employment. Plaintiff filed timely discrimination charges of racial, sex and retaliation against the Defendant within the Internal process of the Equal Employment Opportunity Commission. Plaintiff Hawkins is now and has since June, 1970, been employed by Defendant Equal Employment Opportunity Commission.

5. Defendant, Osma Spurlock, individually and in her official capacity as District Director, William Howard, individually and in his official capacity as Deputy District Director, Elmer McClain, individually and in his capacity as Regional Director, Eleanor Holmes Norton, in her official capacity as Chair and Preston David, in his official capacity as Executive Director of Equal Employment Opportunity Commission and Equal Employment Opportunity Commission is an Administrative Agency of the Federal Government established by Title VII of the Equal Employment Opportunity Act of 1964, as amended to administer the provisions of that law. That said Defendant established an office in Indianapolis, Indiana on or about March, 1970, to investigate and conciliate Defendants business. This facility is located at 46 E. Ohio Street, Indianapolis, Indiana. The defendant is an employer within the meaning of Title VII and is thereby engaged in an industry affecting commerce, employing more than fifteen (15) persons. The Defendant

actions towards its employees is governed by §717 (a) (c), of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. §2000e - 16 (c) amending Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, 42 U.S.C. §2000e et. seq.

ADMINISTRATIVE PROCEDURES

6. Plaintiff, William M. Hawkins, filed his charges of employment discrimination within the Equal Employment Opportunity Commission (EEOC) pursuant §717 (a) (c) of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. §2000e - 16 (c), amending Title VII of the Civil Rights of 1964, Pub. L. No. 88-352, 78 Stat. 255, 42 U.S.C. §2000e et seq. on or about July 6, 1976, based on race, sex and retaliation.

7. The complainant has complied with all of of the administrative procedures that are necessary precedence to perfect his right to file this law suit. On or about July 6, Plaintiff filed his charge, and more than 180 days has passed

and there has not been a final determination:

a. Reprisal complaint dated July 15, 1976;

b. Reprisal complaint dated August 2, 1976;

c. Reprisal complaint dated September 22, 1976;

d. Reprisal complaint dated February 2, 1977;

e. Reprisal complaint dated April 27, 1977,

against the Indianapolis District Office Director and Deputy Director for their discriminatory practices.

8. That the Defendant failed to process said charges to a final determination within 180 days even though the Plaintiff requested on numerous occasions to the Regional Director, Elmer W. McClain, Vice Chairman, Ethel Bent Walsh, Commissioner Colston W. Lewis, EEO Director, Maxine B.Cade, and finally Civil Service Commission, Joseph A. Canedo, Chief Discrimination Complaints and Enforcement Section to investigate his charges.

9. That said Plaintiff has attempted on several occasions to resolve said complaints but each time the Defendants have refused.

10. That on or about June 6, 1977, Regional Director McLain attempted to resolve charges but

again the Defendants, District Director Spurlock, and Deputy Director Howard refused to cooperate in conciliatory efforts.

11. On or about June 7, 1977, Plaintiff wrote to Director Maxine B. Cade, of the Office of Equal Employment Opportunity requesting a right to sue letter and to notify said Director in writing of the deficiency of the internal investigation of Plaintiff charges, and the failure of conciliatory efforts.

12. As of this date I have not received a reply in writing from Ms. Cade. However, I did call Director Cade, and she stated that a Right to Sue Letter was not necessary, that a federal employee may file a complaint anytime after 180 days after a charge has been filed, and that she had full knowledge of all charges filed.

STATEMENT OF CLAIM

13. At all times material to this action, all matters regarding compensation, terms, conditions, rights and privileges of employment of the Plaintiff have been governed and controlled

by Defendants.

14. The Defendant, District Director Spurlock and Deputy District Director Howard intentionally and maliciously have engaged and continue to engage in unlawful employment practices a d policies of the Indianapolis facility in violation of the provisions of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e et. seq. against said Plaintiff.

15. The discriminatory practices include but are not limited to the following:

a. The Defendants, District Director Spurlock and Deputy District Director Howard did direct the complainant to process cases as no cause cases (Chrysler Kokomo cases) which he thought were cause cases, contrary to the principles and procedures of the Equal Employment Opportunity Commission because of his race and sex.

b. The Defendant, Mrs. Spurlock, required him to perform personal services for her because of his race and sex. Specifically she

required him to:

1. Obtain employment for her son, Albert, with the United Parcel Service; to try to get Albert reinstated after he was discharged; to try to find cause for discrimination when he was not reinstated; and to find other employment for Albert.

2. To transport her maid and herself, and to perform other personal services, while he was on Government time.

c. That the Defendant, Mrs. Spurlock, required Plaintiff to train all of the Equal Opportunity Specialists in the office in conciliations, and she failed to support the complainant in his conduct of the training.

d. That alleged discriminating officials, Spurlock and Howard, limited the complainant in his right to go into the field, to accomplish the goals of the agency.

e. The alleged discriminating official, Mrs. Spurlock, required the complainant to perform more duties than the other supervisors. Specifically, the complainant was assigned super-

vision of the Special Projects Unit.

f. Alleged discriminating official, Howard, attempted to force complainant to pre-select a candidate for his unit.

A. Complainant alleges reprisals against him because of filing this EEO complaint, specifically:

1. A. That alleged discriminating official, Howard, issued complainant a warning notice.

B. That alleged discriminating official, Mrs. Spurlock, issued complainant a memorandum for conduct unbecoming a supervisor.

C. That alleged discriminating official, Howard, initiated and alleged discriminating official, Mrs. Spurlock, issued complainant a reprimand for violation of privacy.

D. That alleged discriminating officials, Howard and Spurlock, have constantly harassed complainant. Examples of harassment are:

1. That alleged discriminating official, Howard, forced complainant to lower his performance appraisals of his subordinates.

2. That alleged discriminating official, Mrs. Spurlock took away complainant's good employees and assigned his inferior one.

3. That alleged discriminating official, Mrs. Spurlock, approved employee Woodie Carpenter's within-grade raise after complainant tried to withhold it.

4. That the alleged discriminating officials removed the complainant's responsibility for approving all conciliations for the alleged reason that complainant was harassing a White male supervisor.

5. That the alleged discriminating officials have inundated the complainant with memos pertaining to his behavior and the performance of his unit.

6. That alleged discriminating official, Howard, approved travel for subordinate employee Woodie Carpenter contrary to complainant's orders.

7. That alleged discriminating official, Howard, lowered the Plaintiff's evaluation

appraisal for the year beginning April 1, 1976 and ending March 31, 1977 in retaliation because Plaintiff filed charges of discrimination against defendants.

8. Failing and refusing to take affirmative action to correct the effects of the discriminatory policies and practices complained of herein in violation of the EEOC regulation requiring an investigation within 15 days.

9. The administrative charges filed by the Plaintiff within the Equal Employment Opportunity Commission, attached hereto as Exhibits A,B,C,D,E, and F, are still pending.

10. The Defendant treated the Plaintiff differently than caucasian and female employees similarly situated.

11. The purpose, intent and effect of the acts set forth is to deny Plaintiff Equal employment opportunity.

COUNT II

17. The Plaintiff repeats and realleges paragraph one (1) through above with the same

force as if fully stated herein.

18. The Employment practices of Defendants, more particularly described above, deny Plaintiff the same right to make and enforce contracts as is enjoyed by white citizens and females of the United States of America in violation of 42 U.S.C. §1981, and 42 U.S.C. §1985.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practical date, and cause this case to be in every way expedited, and after such hearing to:

a. Enter a Declaratory Judgment that the practices complain herein are unlawful and violative of Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1866; and the Civil Rights Act of 1871;

b. Permanently enjoin the defendants, their agents, successors, employees, attorneys and those acting in concert with the defendant from engaging in each of the unlawful practices and policies

set forth herein, and from continuing any other practices shown to be in violation of applicable law;

c. Modify unlawful practices and policies set forth herein and any other such practices shown to be in violation of applicable law so that they do not discriminate on the basis of race;

d. Reassign all duties, responsibilities, job openings or positions that were occasionally assigned or granted to Plaintiff Unit I but was taken away or assigned without his approval prior to and subsequent to the filing of Plaintiff charges of discrimination;

e. Allow Plaintiff to perform his duties as Supervisor of Special Project Unit, better known as Unit I to the level he is capable but for the discriminatory practices of the defendant;

f. Compensate and make whole Plaintiff leaves, earnings, wages, promotions and other benefits which he would have received or he lost or used but for the discriminatory practices of

the defendants,

g. Award Plaintiff punitive damages against the Defendants in the amount of Five Hundred Thousand Dollars ($500,000.00) for the mental and physical injuries suffered by Plaintiff because of Defendants intentional, malicious, unlawful discriminatory practices;

h. Award the Plaintiff the cost and disbursement of this action including, but not limited to reasonable attorney's fees;

i. Grant such other relief that may be just and proper;

Respectfully Submitted,

/s/_____
WILLIAM M. HAWKINS
PLAINTIFF

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT

Margaret L. Powell, being first duly sworn says:

1. I reside at 5420 Broadmoor Plaza in Indianapolis, Indiana.

2. I am presently employed with the U. S. Equal Employment Opportunity Commission and have been since February 19, 1974.

3. During my assignments with the Indianapolis District Office, I was elected by staff in November 1976 to serve as Equal Employment Opportunity Counselor. However, I resigned from this position effective January 29, 1979.

4. As the Equal Employment Opportunity Counselor, my role was to act as liaison between staff and management through attempting resolutions of informal complaints.

5. If a complaint was unsuccessfully resolved through the informal procedures employees could

initiate a formal complaint. Whenever an act(s) of retaliation/reprisal occurred subsequent to the filing of a formal complaint the employee was required to establish direct contact with EEOC-Equal Employment Opportunity office in Washington, D.C.

6. However, this was not the procedure followed in April, 1978, with Mr. William M. Hawkins. At that time I was notified by Mr. Terry Banks, Acting Director of Equal Employment Opportunity, and advised that Mr. Hawkins was told to consult me, the Equal Employment Opportunity Counselor, regarding his retaliation charge and which was to be processed through the informal procedures.

7. This was not the regular manner or procedure of handling retaliation/reprisal complaints. I was informed by my instructor during the time I received Equal Employment Opportunity Counselor training in January, 1977 given by the U. S. Civil Service Commission that employees were required to establish direct contact with the EEOC-Equal

Employment Opportunity office in Washington D.C., whenever an act of retaliation/reprisal occurred subsequent to the filing of a formal complaint.

8. This was the first time that I was told and the only time I was told to process an retaliation/reprisal charge by Mr. Hawkins or anyone else, even though I was aware that Mr. Hawkins had filed earlier charges (retaliation/reprisal) while I was the district office Equal Employment Opportunity Counselor.

9. Mr. Kermit Wheeler, Deputy Director of the Equal Employment Opportunity office in Washington, D.C. and Mr. Albert Simmons, EEO Officer of the same office advised me that the policy/procedures outlined in my EEO Counselor training given by the U. S. Civil Serivce in January, 1977, was the policy/procedure used by the Equal Employment Opportunity Commission in processing internal complaints of discrimination against the agency.

10. To the best of my knowledge, memory and belief, the above statements are true and

correct and I state this under penalty of perjury.

/s/
MARGARET L. POWELL
Affiant

Subscribed and sworn to before me this 26th day of June, 1980, Notary Public in and for the County of Marion, State of Indiana, and by law authorized to administer oaths and affirmations.

My Commission Expires:

3-18-82

/s/
MARY F. LOGAN
Notary Public